Supreme Court, U.S
FILED

011025 DEC 16 2001

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

PARENTS AGAINST TESTING BEFORE TEACHING, ET AL,

PETITIONERS

vs.

ORLEANS PARISH SCHOOL BOARD, LOUISIANA STATE BOARD OF ELEMENTARY AND SECONDARY EDUCATION, ET AL,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U. S. COURT OF APPEALS
FOR THE 5TH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIE MATTHEW ZANDERS, SR.
LSBA # 13778
ATTORNEY FOR PETITIONERS
2311 PENISTON STREET
NEW ORLEANS, LOUISIANA 70115
(504) 899-6058

38pp

When state education officials- not classroom teachers-create a new "high stakes" test to measure the academic achievement levels of public school students,

THE CONSTITUTIONAL ISSUES BEFORE THE COURT

1. Are 4th and 8th grade public school students entitled to 14th Amendment due process safeguards relative to adequate notice of the test that becomes the sole basis for non-promotion?

2. Did Louisiana state education officials act arbitrarily and capriciously under *La. R. S. 1724.4* and other federal statutes by retaining 4th and 8th grade students in New Orleans where a test-related curriculum was not developed until three months after the LEAP test was administered?

3. Are public school students who are denied promotion by state education officials based on "a single measure" of student performance entitled to a private right of action under *20 U.S.C. 5812 and 5886?*

4. Do public school students have a liberty interest sufficient to invoke due process protections when state action attaches a stigma of "failure" as interpreted in *Goss v. Lopez (US SupCt 1975) and Brookhart v. Illionois (7th Circuit 1983)?*

5. Did the due process violation encroach upon concepts of justice as interpreted in St. Ann v. Palisi *(5th Circuit 1979) and Brown v. Board of Education (US SupCt 1954) ?*

LIST OF ALL PARTIES

PETITIONERS

PARENTS AGAINST TESTING BEFORE TEACHING, an unincorporated association; 1) CHARMAINE BRYANT, individually and on behalf on her minor child, Krystal Bryant; 2) BRYANT SMOOT; 3) STEPHEN SMOOT, individually and on behalf of their minor child, Lynette Smoot; 4) WAYNE THOMPSON; 5) ROMONA THOMPSON, individually and on behalf of their minor children, Savannah Thompson and Stephen Thompson; 6) NATHANIAL BROWN; 7) DIANE BROWN, individually and on behalf of their minor child, Irene Brown; 8) ALETHA FRANKLIN, individually and on behalf of her minor child, Dominique Franklin; 9) DIEDRA RAYFIELD, individually and on behalf of her minor child, Jessie Rayfield; 10) EVELYN MAGEE; 11) MELVIN MAGEE, individually and on behalf of their minor child, Maurice Magee; 12) TAMAR ALLEN, individually and on behalf of her minor child, Daniel Allen; 13) NAOMI MARK, individually and on behalf of her minor child, Tiffany Raines

REPRESENTED BY:

Willie Matthew Zanders, Sr.
La. State Bar. No. 13778
Attorney for Petitioners
2311 Peniston Street
New Orleans, Louisiana 70115
(504) 899-6058 (Fax) 899-1906

RESPONDENTS

1) ORLEANS PARISH SCHOOL BOARD
REPRESENTED BY:
Polack, Rosenberg, Endom & Riess, LLP
By: Franklin V. Endom, Jr., and
Larry C. Becnel
928 Lafayette Street, Suite 100
New Orleans, Louisiana 70113

2) GAIL MOORE GLAPION
In her official capacity as President of Orleans Parish School Board
REPRESENTED BY:
Polack, Rosenberg, Endom & Riess, LLP
Franklin V. Endom, Jr.,Esq.,
and Larry C. Becnel, Esq.
928 Lafayette Street, Suite 100
New Orleans, Louisiana 70113

3) THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY EDUCATION
REPRESENTED BY:
McGlinchey, Stafford & Lang
Michael H. Rubin, Esq.
Richard A. Curry, Esq.
Michael B. Hicks, Esq.
Jay O'Brien, Esq.
One American Place, Ninth Floor
Baton Rouge, Louisiana 70825

4) GLENNY LEE BUQUET

In her official capacity as President of the Louisiana State Board of Elementary and Secondary Education

REPRESENTED BY:

McGlinchey, Stafford & Lang
Michael H. Rubin, Esq.
Richard A. Curry, Esq.
Michael B. Hicks, Esq.
Jay O'Brien, Esq.
One American Place, Ninth Floor
Baton Rouge, Louisiana 70825

5) CECIL PICARD

In his official capacity as State Superintendent of Education

REPRESENTED BY:

McGlinchey, Stafford & Lang
Michael H. Rubin, Esq.
Richard A. Curry, Esq.
Michael B. Hicks, Esq.
Jay O'Brien, Esq.
One American Place, Ninth Floor
Baton Rouge, Louisiana 70825

All parties have been served pursuant to Supreme Court Rule 29.3.

TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW i

II. LIST OF ALL PARTIES ii

III. TABLE OF CONTENTS v

IV. TABLE OF AUTHORITIES.....vii

V. OPINIONS BELOW 1

VI. JURISDICTION 2

VII. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE .....2.

VIII. STATEMENT OF THE CASE 5

IX. REASONS FOR ALLOWANCE OF THE WRIT 12

The 5th Circuit has decided a novel 14th Amendment due process issue of significant national importance

The 3-judge panel failed to apply legal standards established in prior 5th circuit cases, a 7th circuit case, and several landmark Supreme Court cases.

X. CONCLUSION 27

XI. APPENDIX

A. JUDGMENT OF DISTRICT COURT A-5

B. JUDGMENT OF THE 5TH CIRCUIT A-1

C. DISTRICT COURT HEARING RE: MOTION TO DISMISS AND MOTION FOR PRELIMINARY INJUNCTION .....A-3.

D. TRANSCRIPT OF 5TH CIRCUIT ORAL ARGUMENT.....A-8

TABLE OF AUTHORITIES

CASES PAGES

Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1997).....16

Board of Educ. v. Ambach, supra 436 N.Y.S. 2d at 572-573 15

Brookhart v. Illinois, 697 F. 2d 179, 184 (1983) 14

Brown v. Board of Education (US Sup Ct 1954) 26

Cafeteria Workers v. McElroy, 367 U.S. 886895 (1961) 16

Crump v. Gilmer Independent School District, 797 F. Supp. 552, 555 (E.D.Tex. 1992) 18

Debra P. v. Turlington, 644 F. 2d 397 (1981) 11

Goss v. Lopez 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.....14

Mahaviongasan v. Hall, 529 F. 2d 448 (5th Cir. 1976).....16

Paul v. Davis, 424 U.S. 693, 701-702, 96 S.Ct. 1155, 1160-1161..... ..25

Plessy v. Ferguson, 163 U.S. 537 (1896).....28

San Antonio School District v. Rodriguez, 411 U.S. 1,93 S.Ct. 1278, 36 L.Ed. 2d 16(1972) ..... .22

St. Ann v. Palisi (5th Circuit 1979).....26

Tinker v. DesMoines Independent Community School Districts, 393 U.S. 503.....15

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment 14

U. S. C. sections *5812, 5886*

Constitution for the State of Louisiana , Article I

Louisiana Revised Statute 17:24

PETITION FOR WRIT OF CERTIORARI

Petitioners, Parents Against Testing Before Teaching, et al , respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The judgment of the U. S. States Court of Appeals for the Fifth Circuit appears at Appendix A-2 to the petition and is unpublished.

The judgment of the U. S. States District for the Eastern District of Louisiana appears at Appendix A-3 to the petition and is unpublished.

STATEMENT OF JURISDICTION

Petitioners seek review of the judgment of the U. S. States Court of Appeals for the Fifth Circuit decided on September 17, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1). This petition was filed within ninety (90) days of the entry of the judgment sought to be reviewed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

1. United States Constitution, Amendment 14, in pertinent part:

> "...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection under the law. "

2. Constitution for the State of Louisiana, Article I, in pertinent part:

Section 2. Due Process of Law

No person shall be deprived of life, liberty, or property, except by due process of law.

3. Federal Statutes, in pertinent parts:

20 U.S.C.*5812* (1) School readiness

"By the year 2000, all children in America will start school ready to learn.
...all children will have access to high-quality and developmentally appropriate preschool programs that help prepare children for school; ... every parent in the United States will be a child's first teacher and ...devote time each day to helping such parent's preschool child to learn, and parents will have access to the training and support parents need; ...children will receive the nutrition, physical activity experiences, and health care needed to arrive at school with healthy minds and bodies; and to maintain the mental

alertness necessary to be prepared to learn; and the number of low-birthweight babies will be significantly reduced; through enhanced prenatal health systems.

20 U.S.C.*5812* (3) Student achievement and citizenship

...by the year 2000, all students will leave grades 4, 8, and 12 having demonstrated competency over challenging subject matter including English, mathematics, science, foreign languages,civics and government,economics, arts, history, and geography..."

20 U.S.C.*5812(8)(iii)* Parental participation

... parents and families will help to ensure that schools are adequately supported and will hold schools and teachers to high standards of accountability.

20 U.S.C.*5886(c)* State improvement plans

...Each state educational agency with broad-based classroom teacher input, shall establish and include in its State improvement plan strategies for meeting the National Education Goals by improving teaching and learning and students' mastery of basic and advanced skills in core content areas, such as English, mathematics, science (including physics), history, geography, foreign languages... "

20 U.S.C.*5886(c)(1)(B)*Student assessments

..Each state ...shall establish.. (B) a process for developing and implementing valid, non-discriminatory, and reliable State assessments-- (i) which assessments shall-- (I) be aligned with such State's content standards; (II) involve multiple measures of student performance; (C) a process for aligning State and local curricula,

instructional materials, and State assessments with the State content standards and State student performance standards; (D) a process for familiarizing teachers with the State content standards and State student performance standards and developing the capacity of teachers to provide high quality instruction within the content areas...

4. Louisiana Revised Statutes, in pertinent parts:

Revised Statute 17:24.4(F)

Criterion-referenced tests in English/language arts and mathematics based on state content standards and rigorous student achievement standards set with the same grade level nationally shall be piloted in grades four and eight during the 1997-1998 school year and implemented during the 1998-1999 school year if approved by the State Board of Elementary and Secondary Education.

Revised Statute 17:24.4 (F)(4)(a)

The department shall establish, subject to the approval of the State Board of Elementary and Secondary Education, the nature and application of various intervention options in the case of failure to demonstrate proficiency, which may include remediation, retention in grade, an alternate placement in succeeding grades, or any other option which support a student achieving the required proficiency level.

La. R.S. 17:24.4 (F)(4)(b)

"Establish a process for consistently seeking and considering input from teachers, administrators, city and school board members, legislators, parents, business leaders, and other persons in the community in developing and

establishing proficiency levels and the intervention options provided for in this paragraph.

STATEMENT OF THE CASE

Named petitioners are thirteen (13) public school parents who individually and on behalf of their 4th and 8th grade children, challenge Louisiana's use of a stated-created test to determine student promotions. Petitioners claim 14th Amendment due process violations and other claims under 20 U. S. C. section *5812, 5886* and La. R.S. 17:24.4. These students earned the right to be promoted based on successful academic work and evaluations by their respective classroom teachers but were retained because of the test commonly referred to as LEAP 21, an acronym for Louisiana Educational Assessment Program. In the lower courts, plaintiffs sought judicial relief in the form of a 3 to 5 year moratorium on the use of the test to determine student promotions. They did not seek a permanent ban on the use of the test.

HISTORICAL AND LEGISLATIVE BACKGROUND

In 1994, Congress passed legislation establishing a series of National Education Goals, 20 U.S.C., 5812, 5886, et seq. (commonly known as Goals 2000) which mandated State Improvement Plans "for the improvement of elementary and secondary education in the State." All states receiving federal funds for low income students (Title I) were required by law, to implement new testing or assessment standards applied equally to all students.

On July 15, 1997, the Louisiana Legislature passed *Act 1335* which amended and reenacted *Revised Statute 17:24.4(F)* and created, among other things, a the new testing program referred LEAP 21. The new program focused on student achievement and testing in four subjects: mathematics, English/language arts, science and social science. *Act 1335* imposed new student testing requirements and the attendant duties and responsibilities of the State Board of Elementary and Secondary Education, the state Department of Education, and local school boards. Classroom teachers were stripped of their historic authority to make promotion and retention decisions for students in their respective classes.

In September 1997 state education officials published the first draft copies of Teachers' Guides to Statewide Assessments for mathematics and English/language arts. Draft copies of guides for science and social studies were not published until October 1998. A second "draft" of teachers guides for mathematics and English/Language Arts was also published in 1998.

On June 30,1998, Mr. Cecil Picard, State Superintendent of Education sent each local school district a memorandum informing them of action taken by the Board of Elementary and Secondary Education at its June meeting. The letter stated in pertinent part:

> By October 1, 1998, each LEA [local education agency] shall have provided every K-8 teacher of English and/or Mathematics a copy of their local curriculum document..... By October 1, 1998, each K-8

teacher... shall have received minimum of 10 hours of training on the new curricula." By October 16, 1998, each local superintendent shall provide a "statement of assurance" to the State Superintendent of Education indicating that the curriculum documents have been provided and that the training has occurred." (Plaintiffs' Trial Exhibit "8").

The first LEAP test was administered statewide in March 15-19,1999 and used as a benchmark to determine academic achievement levels at that time. The test was cumulative in that it covered academic materials that students should have been taught between grades 1 and 4 and between grades 5 and 8. The test was not an end-of-the-year or final exam constructed by classroom teachers. Fortunately, no students were retained as a result of the test because nearly one-third of all 4th and 8th graders statewide failed either the mathematics of or English section of the test. The percentage of 8th graders from high-poverty school districts who failed the mathematics section of the LEAP test were as follows: East Carroll Parish (75%); Madison Parish (63%); East Feliciana (49%); and Tensas Parish (50%).

1999 LEAP test scores in Orleans Parish mirrored those of other Louisiana school districts with predominantly black student populations. 53% of all 8th graders and 42% of all 4th graders scored "Unsatisfactory" of the test. Approximately one-third of the students were in a group that state education officials labeled "Approaching Basic" and according to Louisiana's standards they "passed" the LEAP test.

On February 28, 2000, the Orleans Parish School Board adopted a formal Board Resolution asking state education officials not to use the LEAP test as the sole criteria for

student promotion. Local school officials admitted a lack of both teacher and student preparation. Board President Gail Glapion stated :

> "It's a bad public policy for this state to choose one test that removes the teacher totally and completely from the decision-making regarding the children...We believe in our teachers, and we believe in our children, with the proper intervention, can be successful."

Despite the alarmingly low test scores for 1999, and the obvious need for long-term educational reform, on April 25, 2000, the State Board of Elementary and Secondary Education adopted a policy mandating the non-promotion of students who failed either the Mathematics or English section of the LEAP test. Neither the 1997-98 Teachers' Guides nor Superintendent Picard's June 30,1998 letter to local school officials state that student promotions would be based on the LEAP test.

During the 2000-2001 school year, approximately 18,000 4th and 8th grade public school students statewide were denied promotion because of low scores on the LEAP test. However, the New Orleans Public School system is cited as the most egregious offender since its officials did not publish a new LEAP-based curriculum until August 2000, three months after over 5,000 4th and 8th grade students had been denied promotion based on their LEAP test scores. More specifically, 2,800 8th graders (53% of the entire class) and 2,410(42%) fourth graders were retained during the 2000-2001 school year. Petitioners are among this group.

PROCEEDINGS BELOW

State Court

The instant lawsuit was originally filed in the Civil District Court for the Parish of Orleans on August 21, 2000, seeking injunctive relief against ORLEANS PARISH SCHOOL BOARD; GAIL MOORE GLAPION, in her official capacity as Board President; THE LOUISIANA STATE BOARD OF ELEMENTARY & SECONDARY EDUCATION; GLENNY LEE BUQUET, in her capacity as president of the State Board of Elementary and Secondary Education; CECIL PICARD, in his capacity as Louisiana's State Superintendent of Education. More specifically, petitioners alleged due process claims under the Constitution for the State of Louisiana and La. R. S. 17:24.4. They asked the state court to enjoin all defendants from using the Louisiana's new LEAP test for the purpose of retaining 4th and 8th grade students.

Removal to Federal District Court

On August 23, 2000, a Notice of Removal was filed in the U. S. District Court for the Eastern District of Louisiana by all defendants, including Orleans Parish School Board and the Louisiana State Board of Elementary and Secondary Education. Plaintiffs amended their complaint to include 14th Amendment Due Process claims, a private right of action under 20 U.S.C., sections 5812 and 5886 and *Title VI of the Civil Rights Act of 1964.*

August 29, 2000, the defendants filed a Motion to Dismiss for failure to state a claim and for lack of standing under FRCP Rule 12 B (6). Subsequently, all parties filed memoranda.

Motion Hearing

September 14, 2000, the district court judge heard limited oral argument from plaintiffs and defendants on the motion to dismiss and plaintiffs' motion for preliminary injunction. Plaintiffs were only allowed to obtain testimony by stipulation from the two key defendants, the local School Board President , Ms. Gail Glapion, and the State Superintendent of Education, Mr. Cecil Picard. Only one plaintiff witness provided direct testimony, Dr. Ramona Jean Mitchell. The court allowed the defendants to reurge their dismissal motions. and ruled from the bench that plaintiffs lack constitutional standing to bring their claims in federal court on 14th Amendment due process claims. The court ruled from the bench in favor of all defendants pursuant to FRCP 58 noting that 4th and 8th grade students lacked constitutional standing to bring a claim in federal court. Please see Appendix, A-6.

Reservation and Voluntary Dismissal of Plaintiffs' Title VI Claims

While dismissing all of plaintiffs' constitutional claims, the court provided plaintiffs an opportunity to conduct discovery with respect to their Title VI claims. Plaintiffs were told from the bench that they could not expect to prevail on the remaining claims unless they could prove intentional discrimination. On October 5, 2000, plaintiffs filed a Motion to Dismiss Title VI Claims without prejudice and reserving the right to reurge said claims. The motion was granted on October 10, 2000.

District Court Judgment and Reason for Judgment

On October 10, 2000, the district court issued a 2-page written Judgment and Reasons For Ruling (Appendix, A-3). The district judge wrote: "Although the Fifth Circuit found that the students in *Debra P. v. Turlington, 644 F. 2d 397 (1981),* had a property interest in a diploma, no court has ever recognized a property interest in promotion."

Remaining State Claims

The court failed to address plaintiffs state "due process" claims.

Appeal Document Filed in the 5th Circuit

On October 13, 2000, plaintiffs filed a Notice of Appeal to the U. S. Court of Appeals for the 5th Circuit. On January 24, 2001, the Original Brief By Plaintiffs-Appellants was filed in the 5th Circuit. State Education Defendants filed their Original Brief on February 23, 2001 and Orleans Parish School Board filed an Original Brief on February 26, 2001. Plaintiffs- Appellants' filed a Reply Brief on March 21, 2001.

Oral Argument

In their Original Briefs to the 5th Circuit, both Plaintiffs-Appellants and Orleans Parish School Board suggested to the court that oral argument may be beneficial. The State Education Defendants told the court "Oral argument is not necessary."

On August 9, 2001, all parties were heard by a 3-judge panel of the U. S. States Court of Appeals for the Fifth Circuit before Judges DAVIS and JONES, Circuit Judges and BARBOUR, District Judge. A transcript of the argument is included herewith as Writ Appendix A-9.

Petitioners suggest that the transcript of the oral argument may include both facts and legal arguments that are most beneficial to this Court in considering the merits of their petition.

Motion to File a Post Argument Brief

Plaintiffs-Appellants filed a motion for leave to file a post argument brief August 10, 2001, and the motion was denied on August 14, 2001 by Circuit Judge Edith H. Jones.

Judgment of the 5th Circuit

On September 17, 2001, the 5th Circuit Court of Appeals in a one-page PER CURIAM opinion having found no deficiency in the appellants' notice of appeal "affirm[ed] for essentially the reasons stated by the district court." Please see Writ Appendix A-2. According to the 5th Circuit, "The [district] court did not err in finding no due process violations under federal or state law. The only case cited by the circuit court was *Debra P.*, supra., with no reference to the issue of a student's property or liberty interest in a public education. As with the district court, the 5th Circuit reference to the rights of public school students under the state laws cited in plaintiffs briefs, oral argument and pertinent portions of the records.

REASONS FOR ALLOWANCE OF THE WRIT

THE 5TH CIRCUIT HAS DECIDED A NOVEL 14TH AMENDMENT DUE PROCESS ISSUE THAT POTENTIALLY AFFECTS MILLIONS OF PUBLIC SCHOOL STUDENTS AND WHICH

SHOULD BE SETTLED BY THE SUPREME COURT

The factual and legal context of this dispute present a novel due process issue of compelling national importance. The U. S. Congress has recently mandated annual tests for every 3rd through 8th grade public school student in America. If these test results are used for the limited purpose of identifying academic weakness and providing appropriate academic support, petitioners would encourage and welcome such use. However, state education defendants in Louisiana and other states use the results of these external and cumulative tests to deny end-of-the-year grade promotion to students. otherwise qualified for promotion based on academic standards established by the classroom teacher and local school board. Historically, 14th Amendment due process questions adjudicated by this Court involved disciplinary and academic dismissals. Never has this Court considered the question of academic retention as presented in the context of the instant case.

THE 3-JUDGE PANEL REFUSED TO APPLY CONTROLLING LEGAL STANDARDS ESTABLISED IN PRIOR 5TH CIRCUIT CASES, A 7TH CIRCUIT CASE, AND SEVERAL LANDMARK SUPREME COURT CASES

As discussed below, numerous federal courts have addressed "property interest" and 14th Amendment due process rights of public school students. Included among the more significant cases relevant to a proper legal determination of the instant case are the following U.S. Supreme Court cases: 1) *Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975);*

2) Tinker v. Des Moines Independent Community School Districts, 393 U. S. 503;
3) San Antonio School District v. Rodriguez, 411 U. S. 1, 93 S. Ct. 1278, 36 L.Ed. 2d 16 (1972); and 4) Paul v. Davis, 424 U. S. 693, 701-702, 96 S.Ct. 1155, 1160-1161.

The district and the 5th Circuit in the instant case stated that two prior 5th Circuit cases only applied to graduating seniors, *Debra P. v. Turlington* (474 F. Supp. 244 (1979). *Debra P. v. Turlington, 644 F. 2d 397 (1981); Rehearing En Banc Denied Sept. 4, 1981.* However both cases extensively cite *Goss, Tinker and Rodriguez*, infra which did not involve graduating seniors but younger students. Only the U. S. Supreme Court as the national expounder of federal law, can resolve this conflict.

Moreover, the petitioners direct the Court's attention to the Seventh Circuit case of *Bookhart v. Illionois, 697 F. 2d 179, 184 (1983)* where 14 handicapped elementary and secondary students challenged a Peoria School District requirement that they pass a minimum competency test to graduate. While the elementary school students were years away from graduation, they too had constitutional standing as plaintiffs. This is the opposite result of the 5th Circuit ruling regarding Louisiana's LEAP test. In holding that plaintiffs had a protected liberty or property interest at stake, the 7th Circuit in Brookhart, at page 185, cited *Goss v. Lopez*, supra:

> "Plaintiffs in this case have more than merely an interest in protecting their reputations and avoiding the stigma attached to failure to receive a high school diploma. They, too, as in Goss v. Lopez, supra, had

> a right conferred by state law to receive a diploma if they met the requirements imposed prior to 1978: completion of seventeen course credits and fulfillment of the State's graduation requirements. In changing the diploma requirement, the government action by the School district deprived the individual of a right or interest previously held under state law. Plaintiffs thus have a liberty interest sufficient to invoke the procedural protections of the due process clause. *Board of Educ. v. Ambach, supra 436 N. Y. S. 2d at 572-573.*

PUBLIC SCHOOL STUDENTS OF ALL AGES HAVE BEEN AFFORDED CONSTITUTIONAL RIGHTS FOR OVER 80 YEARS.

The 1969 landmark U. S. Supreme Court case, *Tinker v. Des Moines Independent Community School Districts (393 U. S. 503),* held that public school students are "personsunder our Constitution... possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State." Thus, 15-year-old John J. Tinker and his 13-year-old sister, Mary, had a constitutional right to wear black armbands to their public school "symbolically speaking" against the war in Vietnam.

Mr. Justice Fortas delivered the opinion of the Court:

> "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their

> constitutional rights to freedom of speech or expression at the school-house gate. This has been the unmistakable holding of this Court for almost 50 years."

DUE PROCESS REMAINS AN IMPORTANT FEDERAL QUESTION

The extent to which due process is afforded students in academic matters versus disciplinary matters is an unsettled legal issue and one that can only be resolved by this Court. As noted by Chief Justice Rehnquist in *Board of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1997):*

> " ... we have frequently emphasized that [t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy, 367 U. S. 886 895 (1961).* The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of academic dismissal."

In *Mahaviongasan v Hall, 529 F. 2d 448 (5th Cir. 1976)*, the Fifth Circuit considered the application of due process standards to the denial of an academic degree. Plaintiff was pursuing a graduate degree in education and objected on constitutional and contractual grounds to the university's belated decision to require a comprehensive examination for receipt of the degree after the commencement of her studies.

In *Debra P. v. Turlington*, infra, the 5th Circuit distinguished *Horowitz:*

> " *The practical problems in Horowitz were* manifest. Sifting through an individual student's past clinical record, rehashing physician evaluations, and litigating bedside manner were problems foreign to judicial expertise. The factual context in the instant case is very different. The Court is not asked to evaluate an individual student's performance, but to resolve a dispute involving the legislative decision to implement a test which determines graduation from high school with the standard credential, a diploma. While the factual inquiry is considerably different so are the parties. The Plaintiff in Horowitz was pursuing graduate education in advanced studies. The plaintiff in all classes in the instant case were participating in secondary education required by the state compulsory education law.

The 5th Circuit in Mahaviongasan also discussed *Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975):*

> "The Supreme Court in Goss recognized that even the suspension of a student for one day infringed upon the students' due process property right in attending school. Students in Florida are required to attend school pursuant to the state's compulsory attendance statute... Graduation is the logical extension of successful attendance."

While the state has redefined in a sense, what successful attendance for purposes of a diploma should be,

the Court is of the opinion that the SSAT II requirement should be excluded for the same reason that notice of the test has been shown to be inadequate.

See also Crump v. Gilmer Independent School District, 797 F. Supp. 552, 555 (E.D.Tex. 1992) which cited *Debra P.*, supra, as the controlling authority in holding that " in order to meet constitutional standards, at least four to six years was required to implement a new testing requirement.

INADEQUATE NOTICE OF THE TESTING SCHEDULE

In a landmark case involving state-mandated tests for public school students, a U. S. District Court in Florida decided *Debra P. v. Turlington* (474 F. Supp. 244 (1979). Plaintiffs challenged the timing of testing schedule for Florida's State Student Assessment and questioned whether the test instrument measured what was actually taught in the classroom.

The detailed substantive analysis of the trial court may be instructive because of the many striking similarities with Louisiana's testing schedule. In Florida, teachers became aware of the objectives of the test four months in advance of the first administration of the test, but only two months of instruction in the application of the skills. At page 263 and continuing, the Debra P. court noted:

> "The results of the first administration reflect the obvious adequacy of the prior instruction in the stated objectives. From December, 1977, the date the

> results of the first administration were released, until April, 1979, the date the third and last administration was held, only thirteen months of instructional time intervened. During this period remediation classes for those who failed were held in almost every Florida county...but those materials were not immediately available."

PREPARATION FOR A CUMULATIVE TEST IS A TIME CONSUMING PROCESS

The decision of the district court was affirmed by the 5th Circuit, cited as *Debra P. v. Turlington, 644 F. 2d 397 (1981); Rehearing En Banc Denied Sept. 4, 1981.* The 5th Circuit held, inter alia, that it was fundamentally unfair and a violation of the Due Process Clause to administer a high-stakes test that covers matters not taught to the students. Louisiana's LEAP test covered 4 years of academic information for 4th graders and 8 years for 8th graders. The test was "cumulative" as opposed to an en-of-the-year exam that the classroom teacher would normally prepare. By imposing a single external test, Louisiana has stripped teachers of the right to do make promotional decisions regarding their own students. According to the court, just as a teacher in a particular class gives the final exam on what he or she has taught, so should the state give its final exam on what has been taught in the classrooms. Again, quoting Debra P.:

> ... This problem is indicative of a much larger issue. Although there is evidence that certain skills were not taught in Florida public schools, let us assume arguendo that all the skills were taught... The

> principal problem with the instant program is that the instruction in previous years took place in an atmosphere without the specific objectives now present and without the diploma sanction. Instruction of the skills necessary to successfully complete the functional literacy test is a cumulative and time consuming process. Knowledge of how to successfully perform the functional literacy skills is not taught in any specific grade, in any specific class, or from any specific type of teacher. It is critical that at the time of instruction of a functional literacy skill, the student knows that the individual skill is being taught must be learned prior to his graduation from a Florida public school."

The court quoted the Report of The Florida Task Force on Educational Assessment Programs: ...They were suddenly required to pass a test constructed under the pressure of time and covering content that was presumed to be elementary but that their schools may or may not have taught them recently, well, or perhaps at all.

In retrospect, the Task Force believes that the schedule for implementing statewide high school graduation standards was too severe. We feel that the most of problems that are identified in later sections of this report are the result of trying to do too much in too little time. Consequently, we believe that the problems can and will be solved over time. Task Force on Educational Assessment Programs, Competency Testing in Florida Report to the Florida Cabinet (Part I) 4 1979

STATE AND LOCAL EDUCATION OFFICIALS WERE ARBITRARY AND CAPRICIOUS IN IMPLEMENTING STATE AND FEDERAL LAWS AND PARENTS HAVE A PRIVATE RIGHT OF ACTION UNDER APPLICABLE FEDERAL STATUTES

In 1994 the federal government's National Education Goals, ***20 U.S.C., 5812*** (commonly known as Goals 2000) gave all states until this school year, 2000-2001, to adopt assessments keyed to new curricula and instructional materials. State and local education officials in Louisiana failed to begin implementing the 1994 federal law until 1997 *(Act 1335)*. It is important to note that in 1977, the Louisiana legislature had mandated that testing programs "shall be implemented beginning with the second grade and shall sequentially incorporate an additional grade level each year thereafter until grades two through twelve have been included" but state education officials never complied with that orderly way of implementing new testing programs---starting from the beginning.

When state officials finally began implementing *20 U.S.C. 5812* which required new state plans to improve public schools, they violated *20 U.S.C. 5886 , et al* which required "multiple measures of student performance" in state plans. Multiple measures, at a minimum would be classroom tests, papers, projects and evaluations by teachers who interact with these students for nine months. According to *20 U.S.C.5812(8)(iii)* "parents and families will help to ensure that schools are adequately and will hold schools and teachers to high standards of accountability. Congressional intent is clear and parents should have a private right of

action under federal law and jurisprudence. Please see text of relevant statutes, Section VI of this petition.

On April 25, 2000, the State Board of Elementary and Secondary Education adopted a policy mandating the non-promotion of students who failed either the Mathematics or English section of the LEAP test. Neither the 1997-98 Teachers' Guides nor Superintendent Picard's June 30,1998 letter to local school officials state that student promotions would be based on the LEAP test.

In 2000-2001 school year, approximately 18,000 4th and 8th grade public school students statewide were denied promotion because of low scores on the LEAP test. However, the New Orleans Public School system is cited as the most egregious offender since its officials did not publish a new LEAP-based curriculum until August 2000, three months after over 5,000 4th and 8th grade students had been denied promotion based on their LEAP test scores.

Petitioners were denied due process of law under the ***Constitution for the State of Louisiana , Article I*** which reads in pertinent part:

> Section 2. Due Process of Law
> No person shall be deprived of life, liberty, or property, except by due process of law

The defendants were arbitrary and capricious in mandating non-promotion in light of the above facts and the letter of La. R.S. 24.4 which allowed other intervention options including remediation or less punitive measures. Parents

had little or no input in "piloting" or testing intervention options under *La. R.S. 17:24.4 (F)(4)(b), supra* which required the consistent involvement as well as that of teachers and other community persons.

There was no research that showed non-promotion would "support a student achieving the required proficiency level". In fact, in the District Court Transcript, (Page 97, line 9) State Superintendent Cecil Picard, speaking through his attorney, Mr. Curry, admitted that state education officials failed to even review the Pilot Study to assess the progress of the new LEAP program prior to testing the students in 1999 or 2000.

MR. CURRY: The Superintendent, if we're talking about the Superintendent, did not review them. He does not have personal knowledge of whether or not they were reviewed.

MUTUAL UNDERSTANDING AND QUASI - CONTRACTUAL RIGHTS

In addressing the contractual nature of the students' "entitlement to a public education" the 5th Circuit had observed in Debra P.supra :

> "From the students' point of view, the expectation is that if a student attends school during the required years, and indeed more, and if he takes and passes the required courses, he will receive a diploma. This is a property interest as that term is used

constitutionally. See Goss v. Lopez, 419 U. S.565, 579, 95 S. Ct. 729, 738, 42 L. Ed. 2d 725, 737 (1975).

This contention is supported by the clear and sincere statement made by Orleans Parish School Board Member,Carolyn Green Ford, in urging state officials not to use the LEAP test for promotional purposes:

> "There has not been enough time for schools to prepare their students for the test, Ford said... interventions other than nonpromotion should be employed for assuring that fourth and eighth graders are better prepared to pass the newly created content-standards LEAP 21 test."

A 14TH AMENDMENT LIBERTY INTEREST IS IMPLICATED WHEN INJURY TO A STUDENT'S REPUTATION IS COMBINED WITH GOVERNMENTAL ACTION

Given the facts in this dispute, non-promotion is a punitive state action. State education officials, under the guise of "holding students accountable" damage a student's reputation or good name by attaching a "stigma" of failure or retainee. In Goss, 419 U.S. 565, public school students were suspended for up to 10 days. This Court stated, in pertinent part: The Due Process Clause also forbids arbitrary deprivations of liberty, where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimum requirements of the Clause must be satisfied. The undeserved retention of a

student for an entire school year is far more damaging than a 30-day suspension. Non-promotion is the suspension of academic progress. Peers might call these students dumb or stupid and peer relationships are paramount in the minds of all students. In the instant case, had the district court allowed to plaintiffs the opportunity to call their expert witness, psychiatrist Roger L. Wortham, he would have focused on the psychological harm to students denied promotion and the fact that petitioners were significantly more likely to drop out of school.

In *Bookhart* at page 185, supra, the 7th Circuit discuss this issue:

> "Though the Supreme Court held that injury to reputation alone does not implicate a liberty interest, *Paul v. Davis, 424 U. S. 693, 701-702, 96 S.Ct. 1155, 1160-1161*, it went on to say that liberty interests are implicated when injury to reputation is combined with "governmental action [that] deprived the individual of a right previously stated under state law." Id. at 708-709, 96 S. Ct. at 1164. The Court in Paul reviewed its holding in *Goss v. Lopez, 419 U. S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725*, involving the procedural due process rights accorded a student suspended from school on charges on charges of misconduct... It was the removal of the right or interest" from the recognition and protection previously afforded by the State, which we found sufficient to invoke procedural guarantees contained in the Due Process Clause of the Fourteenth Amendment." Id. at 711, 96 S. Ct. at 1165."

THE IMPLIED ECONOMIC AND SOCIAL VALUE OF ANNUAL GRADE PROMOTIONS

At page 3 of their 5th Circuit Reply Brief , petitioners reasoned , if one can admit that a diploma is a property right having economic value (awarded only by cumulative promotions), then cumulative grade promotions have economic value. Moreover, petitioners assert the "economic" and "societal" value of due process in the public school setting. The *Debra P.*, court and numerous courts cite *the landmark case Brown v. Board of Education*; 347 U. S. 483, 493, 74 S. Ct. 686, 691, 98 L. Ed. 873, 880:

> "Today, education is perhaps the most important function of State and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society." It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if it is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

JUSTICE AND FUNDAMENTAL FAIRNESS

The Brown case and the federal statutes quoted herein cite the importance of civics and citizenship. A collateral issue is justice which the 5th Circuit addressed in *St. Ann v. Palisi, 495 F. 2d 423, 425 n. 5 (5th Cir. 1974)*:

> "The due process violation potentially goes deeper than deprivation of property rights without adequate notice. When it encroaches upon concepts of justice lying at the basis of our civil and political institutions, the state is obligated to avoid actions which is arbitrary and capricious, does not achieve or even frustrates a legitimate state interest, or is fundamentally unfair. We believe that the state administered a test that was, at least on the record before us, fundamentally unfair in that it may have covered matters not taught in the schools of the state."

CONCLUSION

Although the state of Louisiana constitutionally may not be obligated to establish and maintain a school system, it has done so, required attendance and created a mutual expectation that the student who successful complete all academic work assigned by his or her teachers during the school year will be promoted to the next highest grade at the end of that year. This expectation can be viewed as a state-created "understanding" that secures certain benefits and that supports claims of entitlement to those benefits. *Board of Regents v. Roth, 408 U. S. 564, 577, 92 S. Ct.*

2701, 2709, 33 L. Ed. 2d 548 (1972). As the district court in Debra P. observed "graduation is the logical extension of successful attendance" then promotion is the logical extension of successful attendance during the school year. Petitioners applaud Louisiana's effort to improve the achievement level of all public school students. Educational improvement is long overdue in Louisiana but this state did too much too soon after failing to act between the 1994 federal mandate and the 1997 LEAP initiative. Petitioners sincerely believe that the problems "can and will be solved over time". Without a "due process" opportunity for these students to challenge the timing and relatedness of these non-teacher tests, the very fabric of public education may be eroded. The testing schedule adopted by state officials frustrates an otherwise legitimate state interest .

The State of Louisiana should continue to administer the LEAP test but a 3 to 5 year delay in the use of the test to determine promotion will balance the state's 10th Amendment powers with students' 14th Amendment rights. It is not in the state's interest that its education officials unilaterally and untimely usurp the traditional authority of classroom teachers and local school boards in the classroom setting. Students, parents and teachers have rights under the U. S. Constitution and no child should be left behind ! To rephrase Mr. Justice Harlan's eloquent words in his dissenting opinion in *Plessy v. Ferguson, 163 U. S. 537 (1896):*

What can more certainly arouse teacher-student divisiveness, what more certainly create and perpetuate a feeling of distrust between teachers, students and

government officials, than state enactments, which, in fact, proceed on the ground that students and their classroom teachers are so inferior and degraded that they cannot be allowed to sit in a public school classroom for an entire year and make a reasonable and quasi-contractual determinations as to what was taught and what was learned ? That, as all will admit, is the real problem with ***Act 1335***, the1997 student testing legislation as was enacted in Louisiana.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Willie M. Zanders, Sr. 12-16-01

Willie Matthew Zanders,Sr.
La. State Bar. No. 13778
Attorney for Petitioners
2311 Peniston Street
New Orleans, Louisiana 70115
(504) 899-6058 (Fax) 899-1906